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Review of Owen Fiss, *Troubled Beginnings of the Modern State, 1888-1910*

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The most significant collaborative effort in the literature of American constitutional history, the Oliver Wendell Holmes Devise History of the Supreme Court of the United States, is nearing completion. A generation has passed since the appearance of the first volume, authored by Julius Goebel, Jr.,[1] and (after many vicissitudes affecting several of the works in the series) the appearance of this volume marks the antepenultimate stage. Though Professor Fiss' remarkable achievement deserves to be viewed primarily on the basis of its own merits as a study of the Fuller Court, a just appreciation of its contribution to the literature requires us to explore two historiographic questions: the book's place within the intergenerational effort that Holmes inspired and its contribution to the very active contemporary re-examination of the jurisprudence usually epitomized by reference to *Lochner v. New York*.[2] Viewing this book against the historiographic background, I submit, *Troubled Beginnings of the Modern State* is a splendid example of the trend in American constitutional history in our time. In what follows I attempt to describe the book's role in the new scholarly synthesis, and to indicate the respects in which I find myself not entirely in agreement, both with the book and with the synthesis it so ably represents. But, though it delays us somewhat in taking up the content of the book itself, we should first consider the great significance of finding a book like this as part of the *Holmes Devise History* at all.

I. A Short History of the *Holmes Devise History*

Nothing Justice Holmes ever did so bewildered the United States Government as his final decision: to make the United States his residuary legatee. It took twenty years for the wheels of government to grind out an appropriate employment for the more than $250,000 Holmes bestowed on his puzzled country. When once Congress had created the Permanent Committee for the Oliver Wendell Holmes Devise and made an appropriation to cover the embarrassing absence of interest accrued during years

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1. **Julius Goebel, Jr., History of the Supreme Court of the United States: Volume 1, Antecedents and Beginnings to 1801** (1971).

2. 198 U.S. 45 (1905).

of uncharacteristic congressional indecision about what to do with money,[3] it took another fifteen years for the first of the volumes in the multi-volume *History of the Supreme Court of the United States* to make its appearance.[4]

Initially, the Devise Committee, substantially influenced by the opinions and energy of Justice Felix Frankfurter,[5] selected among the proposed authors of the respective volumes (along with several of the Justice's former law clerks) a number of legal historians whose careers had already involved significant research commitments in the areas of specialization required. Not only Julius Goebel, Jr., but also Carl Brent Swisher, Charles Fairman, George Lee Haskins and Herbert A. Johnson conformed to this model to a greater or lesser degree. For several of these scholars the Holmes Devise volume was the summation of a scholarly career, representing the last major publication of a long lifetime in the field.

Both as a consequence of the research investment of the authors, and also as a result of the vision of institutional history that prevailed in their generation, a distinctive property of the early volumes of the *Holmes Devise History* was bulk. Thousand-page volumes became an unofficial standard, and of such volumes Professor Fairman produced the equivalent of more than two without exhausting his material; he required an additional 200-page volume to discuss the work of the five Justices whose Electoral Commission decided the disputed Presidential election of 1876. Archival research swelled not only the volumes but the duration of their production: Goebel's bibliography listed almost ninety major collections of manuscripts consulted, apart from federal judicial records and eighteenth-century periodicals,[6] while Gerald Gunther's archival research on the later Marshall Court

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3. *See* Pub. L. No. 84-246, 69 Stat. 521 (1955).

4. *See* **Goebel**, *supra* note 1, at xi.

5. The role of Justice Frankfurter in selection of the Devise historians is commented upon by one of the second-generation authors, G. Edward White, who took over volumes 3 and 4, on the Marshall Court after 1815, from Frankfurter's former law clerk, Gerald Gunther. *See* **G. Edward White, History of the Supreme Court of the United States; Volume 3-4, The Marshall Court and Cultural Change, 1815-1835** at xix-xx ("with the aid of Gerald Gunther," 1988).

6. *See* **Goebel**, *supra* note 1, at 814-819.

consumed the better part of two decades and eventuated in several thousand pages of unpublished and apparently unpublishable commentary.[7] Within this somewhat extensive compass, the early volumes of the *History* were predictably addressed to the industry, patience, and intellectual needs of specialists. Entombed within them lay an exhaustive narrative reconstruction of the work of the Supreme Court in many of its most important periods. The degree of thematic coherence imparted to the material varied, but in no case did Justice Holmes' money seem to have been invested in a way from which the generally-educated population of the nation could profit in the slightest. For the legal historians of my generation, who began our professional educations in the later 1970s or early 1980s, having cut our teeth (and worn them down) on the *Devise History* was part of the pain and glory of the historian's *bildung*. And yet I suspect—without intention to incriminate—that not all my contemporaries actually completed the task.

The necessary revolution in the conception of the *Holmes Devise History* was begun by G. Edward White and superintended by the *History*'s General Editor, Stanley N. Katz. With the passing of the pre-World War II institutionalists and the former law clerks to Justice Frankfurter, a new vision of the role of the *History*, and indeed of constitutional history generally, could emerge. White reduced the planned two volumes on the later Marshall Court into one, and although that one consumed the usual thousand pages, this represented, after all, a fifty percent reduction of the pre-existing expectations. More importantly, his book departed fundamentally from the pattern of exhaustive institutional description, adopting a self-consciously revisionist interpretive posture. With a thunderclap, fresh air entered into the *Devise*. In a development previously unimaginable, a lengthy but manageable abridgment was issued by the Oxford University Press in paperback.[8] The *Holmes Devise History* was now aimed at non-specialists and students.

This revolution is very much furthered by the present volume. It may seem peculiar to celebrate the brevity and

7. *See* **White**, *supra* note 5, at xvii.

8. **G. Edward White, The Marshall Court and Cultural Change, 1815-1835** (1991).

coherence of a 400-page monograph, but it was to explain why hearts (including mine) leapt up at the very sight of the book that I have taken readers on the present journey. Sometimes, despite the proverb, intelligent judgment of a book begins with the shape of the cover.

II. *Troubled Beginnings* and the New Synthesis

In approaching Fiss' work, then, we must be conscious that we are reading a synthetic work for a wider non-specialist audience, but one which is explicitly dedicated to making thematic arguments about the role of the Supreme Court from the 1880s to the eve of the Wilson Administration. In a distinguished scholarly career, this is the author's first extended foray into history-writing, and it will no doubt stand as one of the most impressive such debuts of its generation. The mechanism of the scholarship reflects both the revolution in purpose and the professional locale of the author: manuscript sources (with the partial exception of the Holmes Papers at Harvard Law School) are not heavily relied upon; secondary literature—particularly on the surrounding political and social history—has a tendency to collect in lengthy string citations in the opening footnotes of each chapter, rather than forming an intimate part of the analysis from point to point and page to page. This latter tendency is probably an advantage to students and others seeking to compile easily a bibliography of related and supplementary reading, but it somewhat defeats the book's obvious intention—in reaction against earlier volumes in the series—to put Supreme Court constitutional history securely back into its larger context.

Fiss' touch is sure, on the other hand, in describing the relation between constitutional theory as he finds it in the cases of the Fuller Court and the constitutional theory of the later twentieth century. The constitutional law literature of our own time is woven throughout the book, and is in constant dialogue with the text in precisely the way the contemporary social history of late nineteenth-century America is not. The distinctions between constitutional theory after 1937 or 1954 and the constitutional thought of the Fuller Court provide Fiss with his overarching themes, and form the predominant subjects of his brief opening and concluding chapters. (Pp. 9-21, 389-95.) It is the pursuit of these themes which joins Fiss to other recent attempts to understand this epoch in the development of our constitutional law.

A. *Liberty, the Fuller Court, and the Progressive Agenda*

At the center of Fiss' history is the claim that "the Fuller Court should be understood as an institution devoted to liberty and determined to protect that particular constitutional ideal from the social movements of the day." (P. 12.) In pursuing this interpretive position, Fiss says, he "labor[s] uneasily against a scholarly tradition that treats all the talk of liberty by the Fuller Court as mere camouflage or subterfuge and insists that Fuller and his colleagues were simply using their power to further class interests." (*Id*.) Whether these are the interpretive alternatives is a subject to which I shall return below, but Fiss energetically and effectively pursues his chosen conceptions through the record of the Supreme Court's response to the tide of legal and political agitation we call progressivism.

For Fiss, the Fuller Court's treatment of the legal effects of progressivism—including the Sherman Act, wage and hours legislation such as that involved in *Lochner*, and rate regulation—disproves the notion that a crass form of class justice motivated the Court. The Court's aggressive interpretation of the Sherman Act between *Trans-Missouri Freight*[9] and *Northern Securities*[10] shows the Court's willingness to accommodate progressive measures by expanding the reach of the Commerce Clause as a limitation of due process liberty interests, so that "the commerce and due process inquiries became coextensive, and due process became the secondary or subordinate category." (P. 110.) Though Fiss perceives a Court troubled by progressive reliance on legislation, because statutes are as Fiss says "the embodiment of will rather than of reason," (p. 105), protection of the liberty-enhancing value of competition brought the Court to favor a strong view of congressional intention in forbidding any restraint

9. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

10. Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

of trade in interstate commerce. This view of antitrust doctrine, which prevailed for slightly less than seven years, definitively answers, in his opinion, "[t]he instrumental accounts of the Fuller Court's encounter with antitrust."[11] The period of "coherent" antitrust doctrine was ended by the Court's response to the "special threat to liberty and federalism in President Roosevelt's effort to undo the effort of James J. Hill and J.P. Morgan to merge two rail lines" at stake in *Northern Securities*. (P. 110.) Only a "new synthesis" achieved by Justice White in *Standard Oil*[12] and *American Tobacco*[13] reconciled the tension between liberty interests, as the Court "mooted the constitutional objection based on liberty by inserting the constitutional protection of liberty within the terms of the statute itself," thus "deconstitutionalizing this branch of the law." (P. 110-11.)

For Fiss, this view of the early history of the Sherman Act is of great importance in offsetting the otherwise disquieting implications of *Lochner* and *Lochner*-ism, which it is Fiss' polemic purpose to rescue from the untender mercies of the progressive historians. Cherishing liberty at the expense of the "technocratic" ambitions of progressive politics—which invoked will rather than reason through the process of legislation—is a sentiment with which Fiss can identify. The crux of his book is the devotion of his formidable skills of explication and analysis to showing that justices for whom the Sherman Act's expansion of the commerce power into the zone of otherwise protected liberty was acceptable found the intrusion of the States' police power into the same areas through wage and hours legislation or rate regulation insupportable because the state invocations of the police power more fundamentally upset a neutrally-defined conception of liberty: "*Lochner* sought to say clearly and unequivocally that the legislative power was indeed limited, and to do so during a time when those limits were being called dramatically into question by the progressive movement." (P. 165.) If the Court had been

11. P. 117. Fiss uses "instrumental" and "instrumentalist" as the label for the "scholarly tradition that treats all the talk of liberty by the Fuller Court as mere camouflage or subterfuge and insists that Fuller and his colleagues were simply using their power to further class interests." The soundness of this interpretive nomenclature is discussed at p. 11, *infra*.

12. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

13. United States v. American Tobacco Co, 221 U.S. 106 (1911).

consciously engaged in the mere protection of private economic privilege, the antitrust cases would have come out like *Lochner* and *Ex parte Young*.[14] Instead, the Court defended liberty, meaning limits on the power of majoritarian institutions—a neutral or non-instrumental activity. Any evaluation of this interpretation must begin with an inquiry into the nature of the "liberty" the Court, in Fiss' view, defended.

B. *Liberty and the "Social Contract Tradition"*

As Fiss sees it, the concept of liberty in the era of the Fuller Court was defined by reference to what Fiss calls "the social contract tradition." A precise definition of the meaning of liberty in "the social contract tradition" appears inconveniently late in the book, at the beginning of the concluding chapter; until that point we are assumed to know, I think, what it is on the basis of its results in the cases, its "implicit" appearances in the speeches of Justices and the arguments of counsel, and the occasional reference to John Locke:

> In this tradition, liberty was conceived of as something that belonged personally to the individual, like a special kind of property or possession. Liberty was something that could be enjoyed even by individuals who lived outside organized society, and who met their needs by their own labors and by barter and exchange. … The social contract tradition was also defined by its reduction of liberty to a demand for limited government. The state was seen as the natural enemy of freedom, prohibiting individuals from doing whatever they wished, setting limits on their conduct, or requisitioning their property. … In … cases [such as those in which the Court struck down wages and hours legislation or the income tax] government power—that of the states as well as the federal government—was held to be limited to the accomplishment of discrete, previously specified ends. As in the fables of classical social contract theory, government was seen as a deliberate contrivance, and the constitutive process

14. Ex parte Young, 209 U.S. 123 (1908).

> that brought the state into being also set the limits on its authority. (Pp. 389-90.)

The essence of this point, of course, is the identification between liberty and limited government. It is not, to be sure, an unfamiliar one; Fiss could have followed any number of earlier writers and established the connection between the two conceptions by pointing out, as he does not, that the leading constitutional treatise in the last third of the nineteenth century (seven editions of which appeared before 1910) was universally known as "Cooley's Constitutional Limitations."[15] The concept of limited government is also denoted in Fiss' account by the phrase "constitutive authority," which means authority "artificially or deliberately created to serve discrete ends." (P. 158.) *Lochner* and the other monuments of the Fuller Court are then coherent principled delineations of the limits of constitutive authority, through which the Court expressed a purely contractarian vision.

"[L]iberty of contract … was, in the end, not a principle from which limits on state power were derived, but rather the space or area left to the individual after the reasons for the creation of state power were exhausted." (P. 159.) m Thus the critical burden Fiss' account must carry is to show that limitation on government arose in this intellectual system from consent, as a consequence of "social contract," rather than as a result of man's possession of natural rights. If, as Fiss also says, liberty existed for these thinkers "outside organized society," then the task for the historian of ideas becomes even more urgently to establish the presence of specifically contractarian notions.

And it is just here, unfortunately, that Fiss has the most difficulty with his argument. "Themes implicit in the social contract tradition" are discovered in many places, including quite surprisingly "in social Darwinism," (p. 47) but the problem of locating their *explicit* expression remains somewhat vexing for

15. **Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union** (1st ed. 1868). One of the interesting features of Fiss' approach is his absence of interest in the relations between the Supreme Court and the academic legal culture in his period. This might be more comprehensible in a work of narrower institutional focus with less ambition to interpretive synthesis. It is odd to read a modern book about the Supreme Court in the *Lochner* era in which Cooley figures only in relation to the Interstate Commerce Commission (pp. 186, 196-97), while Christopher Tiedeman (and, for that matter, Christopher Columbus Langdell) are never mentioned at all.

him. Fiss refers often to a speech by Justice David Brewer, delivered at Albany in January 1893, strongly defending the role of the courts in preventing the coercive redistribution of property through mass labor agitation. Brewer's words are said to reflect the view that "the consent exalted by social contract theory is not one constantly open to revision (as in the electoral process), but rather one that binds over time, in the face of changed conditions and changed minds." (P. 81-82.) But when Fiss comes to consider closely the text of the speech itself, nary a word of contractarian rhetoric does he quote. (Pp. 53-57.) To say, as Brewer did, that what "differentiate[s] the civilized man from the savage [is] that which he knows, that which he is, and that which he has," (p. 53) is not to demonstrate a contractarian approach. Similarly, Fiss quotes Joseph Choate arguing against the validity of the income tax before the Supreme Court in *Pollock v. Farmers' Loan & Trust Co.*: "I have thought that one of the fundamental objects of all civilized government was the preservation of the rights of private property. I have thought that it was the very keystone of the arch upon which all civilized government rests, and that this once abandoned, everything was at stake and in danger.[16] Of this passage Fiss says: "In speaking of preservation of property as 'one of the fundamental objects of all civilized government,' Choate echoed Brewer's Albany speech and implicitly drew on the principles enshrined in the social contract tradition." (P. 81.) But to invoke the idea that one of the purposes of government is to protect property is not to draw on specifically contractarian principles, any more than it would be contractarian to suggest that a civilized government protects liberty of speech or religious worship. The reference from Choate's argument to Brewer's speech merely compounds an assertion. Perhaps both are examples of "the social contract tradition," but neither one is provably so on the basis of Fiss' analysis.

Indeed, it seems to me that Fiss at least owes us consideration of the alternative—and somewhat more common—theory that these passages, and other judicial and non-judicial expressions of opinion in the period, are examples of something a little different from "the social contract tradition," namely a belief in natural rights. That concept is curiously absent from this book, appearing

16. 157 U.S. 429, 533 (1895).

in only one place, in connection with the use of the phrase by Justice Brown in his opinion in the central component of the *Insular Cases*, *Downes v. Bidwell*.[17] Fiss may be right to believe that the concept of liberty in the Fuller Court is primarily traceable to social contract ideas, and he may be equally right to ignore altogether the possible influence of natural rights theories on the judges. But it seems to be true, at a minimum, that his case on this important point could have been stronger, and that something was to be gained by a less inarticulate dismissal of the alternative. An approach to the jurisprudence of the late nineteenth century emphasizing the role of natural rights ideas has some advantages, as I shall try to show below.

C. *Rehabilitating the Fuller Court*

Fiss' success in his central task as a doctrinal historian—the elucidation of the Supreme Court's varied approaches to the protection of liberty in the public law of the era—bears out his argument that a purely "instrumentalist" vision of the Court, taking as its end in view the preservation of class privilege, fails to account fully for the actual development of constitutional doctrine. But as Fiss acknowledges, maintaining that the Court's talk of liberty was "mere camouflage or subterfuge" (p. 12) is not the most intellectually significant position:

> Those inclined toward the instrumental hypothesis might concede that the reasoning offered by the justices in their opinions was not crafted to mislead, at least not on any conscious level. … The justices … may have genuinely struggled over the

17. Downes v. Bidwell, 182 U.S. 244 (1901). Brown offered the theory that congressional legislation in the newly-acquired possessions would be limited by "natural" as opposed to "artificial or remedial" rights, *id*. at 282-83. For Fiss' discussion of the case, see p. 239-40. It is interesting to compare Fiss' index, which gives 45 primary references to "social contract tradition" and one reference to "natural rights," with that of another recent work on legal thought over a somewhat longer period, **Morton J. Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy** (1992), which gives 49 primary references to "natural rights," and none to "social contract." This is not, I believe, an artifact of publishers' index-making. It ought to be said, for purposes of completeness of analysis, that Horwitz's book is nowhere cited or mentioned by Fiss. As is invariably the case with quantitative evidence, readers must attach their own significance to the numbers.

> meaning of the constitutional ideal of liberty, but that ideal itself, so instrumentalists might now argue, was shaped by class interests that operated in the background and at a deeper level. In this view class interests were the structural determinants of the ideal of liberty. (Pp. 17-18.)

Leaving aside the use of the term "instrumental" for a moment, Fiss here concedes that his most significant interpretive task is to convince the doubter who asserts not the insincerity of the justices, but rather the importance of socially structured constraints on legal thought. Whether such a position implies that the judges are "instrumentalists" is open to doubt: accepting that the end they had in view was liberty only, the alternative interpretation asserts that they pursued this goal within an intellectual context determined in substantial measure by their social locale.[18]

Nor is the only possible version of such an argument one in which it is "class interests" that operate "in the background and at a deeper level." Other aspects of social organization also condition the thought processes of judges, a subject to which I return below. Rightly, however, Fiss sees common ground between progressive historians and New Deal constitutionalists in the creation of such an account of the Fuller Court. For Fiss, the intellectual realignment of the New Deal period required the creation of a constitutional mythology in which the work of the Fuller Court, symbolized by *Lochner*, was stigmatized as reactionary class-interested instrumentalism devoid of intellectual responsibility. With *Brown v. Board of Education*,[19] Fiss maintains, dissonance built up within that interpretive position:

> It was as though the Fuller and Warren Courts were locked in a dialectic across history. … Oddly enough, however, in time the dialectic took a new turn and began to reverse itself. As *Brown* became more fully absorbed into the national political and legal culture and assumed an almost axiomatic quality, *Lochner* began to appear in a new light. Those who, like myself, took *Brown* as their

18. I assume that the reference to those arguing for such an interpretive hypothesis as "instrumentalists" is merely an uncaught error.

19. 347 U.S. 483 (1954).

> starting point, began to wonder whether *Lochner* was in fact mistaken. … [O]ver time *Brown* appeared as an invitation to reexamine the settlement of 1937, to wonder whether the use of the judicial power affirmed by *Lochner* and by the other decisions of the Fuller Court was in fact illegitimate. This work takes up that invitation. (P. 12.)

And in doing so it is not alone. While ultimately maintaining the view that *Brown* passes some test of constitutional propriety that *Lochner* fails, Fiss joins many other constitutional theorists and historians of this generation in seeking to transcend the crabbed view of the Fuller Court that was one of the least attractive legacies of Legal Realism and progressive history. Morton Horwitz, Bruce Ackerman, Cass Sunstein and others have contributed to a more balanced view of the works of what Horwitz called "Legal Classicism" during what I think it is still proper to refer to as the Gilded Age.[20] Fiss, in speaking of reconsidering the "legitimacy" of those decisions, associates himself more with the enterprise of constitutional theory than constitutional history, but as he properly notes, "[t]he question of validity remains outside the scope of this book." (P. 19.)

Not all of those reconsidering the history are motivated to take a more charitable view of the results. To Horwitz, for example, *tout comprendre, ce n'est guère tout pardonner*. Fiss too expresses the hope that his work will not be taken as an apology, as distinguished from "return[ing] to the words of the justices, plac[ing] them in a conceptual framework and historical context that render them meaningful." (P. 12.) In saying, therefore, that the present work consolidates and places within the compass of the *Holmes Devise History* the emerging revisionist view of the Fuller Court, I am not speaking of a wholesale change in attitude toward the Court's holdings. The essence of the revision is captured in Fiss' rejection of what he calls the "instrumentalist"

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20. *See* **Horwitz**, *supra* note 17; **Bruce A. Ackerman, We the People: Foundations** 151-64 (1992); Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987).

view, instead emphasizing the creative and intellectually coherent aspects of the Court's doctrinal positions.[21]

In one very important respect, however, the interpretive diversity of the revision is greater than had previously appeared. This is the significance of Fiss' attribution of the Fuller Court's conception of liberty to the "social contract tradition." Horwitz and Ackerman agree that the creative jurisprudence of the Fuller Court came about through the integration of natural law concepts that both also agree were the outcome of the Fourteenth Amendment's language and intellectual background. For Fiss natural law conceptions are not important enough to mention, much less the mainspring of the Fuller Court's intellectual machinery.[22] Since the book does not address this difference between its own interpretation and the one advanced by the most influential contemporary studies,[23] we can only hope that further writings will shed some light on the sources and degrees of disagreement.

Even more important than the disagreement over the roots of the Fuller Court's conception of liberty, however, Fiss' treatment of what he calls the "instrumentalist" argument,[24] raises a question going to the heart of his version of the new synthesis: Should we accept an intellectual history of public law in late nineteenth-century America in which neither class considerations nor other socioeconomic interests operated "in the background or

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21. I have commented on the ways in which recent works by Horwitz and Ackerman have contributed to this spirit of revision. *See* Eben Moglen, *The Transformation of Morton Horwitz*, 93 Colum. L. Rev. 1042 (1993) (book review); Eben Moglen, *The Incompleat Burkean: Bruce Ackerman's Foundation for Constitutional History*, 5 Yale J.L. & Human. 531 (1993) (book review).

22. The relation of the particular natural law arguments developed by the antebellum antislavery movement to the text and subsequent doctrinal development of the Fourteenth Amendment was central to the interpretation of **William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine** (1988), the most significant recent scholarship on the subject. Fiss nowhere refers to Nelson's book.

23. Perhaps Fiss believes that natural law ideology was an integral part of his "social contract tradition." This would be problematic, in view of his assertion that "liberty of contract … was, in the end, not a principle from which limits on state power were derived, but rather the space or area left to the individual after the reasons for the creation of state power were exhausted." (P. 159.) This seems squarely in conflict with a natural-rights view.

24. *See supra*, p. 11.

at a deeper level" as "structural determinants of the ideal of liberty"? For Horwitz, whose work focuses its attention on private rather than public law, the answer is almost certainly negative; one primary goal of his account of Legal Classicism is the elucidation of those structural determinants of private law doctrine in the period Fiss writes about. One of my regrets about Horwitz' *Crisis of Legal Orthodoxy* is that it did not broaden its focus to include consideration of the full range of Fourteenth Amendment doctrine in the Progressive Era.[25] Fiss is but one of the scholars who would have profited, I think, from an opportunity to consider such a presentation. For my own part, while by no means out of sympathy with Fiss' primary goal—to free the history of the Fuller Court from the distorting narratives of the New Deal Era—I think to omit consideration of structural limitations of the justices' thought is a serious weakness.

III. Failures of Judicial Imagination: A New New Synthesis

It merely restates the obvious to point out that the American socioeconomic landscape of 1900 was wildly different from that of 1860. Business enterprises unprecedented in scale, employing concentrations of capital and numbers of workers beyond the imagining of previous generations, had become commonplace. Confrontations between organizations of workers and the massed power of employers grew increasingly bitter, and private armed forces were used, from the steel mills of Pennsylvania to the copper mines of the intermountain west, to intimidate, coerce, or even fire upon striking workers. By 1894, with the economy gripped by the most severe contractions in American economic history prior to 1929, the possibility of a general social confrontation between labor and capital loomed frighteningly near. Between 1870 and 1914 the United States absorbed more than 25 million immigrants in one of the greatest demographic movements in human history.[26] At the turn of the century new technologies of production, transportation, and communication

25. *See* Moglen, *Transformation of Horwitz*, *supra* note 21, at 1058-59.

26. *See* **United States Bureau of the Census, The Statistical History of the United States, From Colonial Times to the Present** 105-06 (1976).

just reaching fruition permitted further expansions in the reach of private economic power.

Yet during the same period the Supreme Court crafted a series of constitutional doctrines designed to rein in what was asserted to be a significant danger posed by overweening *public* power. Explaining this disjunction is the central problem for the historian of late nineteenth-century public law. Rather than explaining it, the Fiss version of the new synthesis chooses to explain it away. The "instrumentalist" view attributed to the progressive historians whom he rejects would at least confront the problem: judges and lawyers, but most particularly the justices of the Supreme Court, were conscious allies of the new private economic powers, and their constitutional doctrine was deliberately directed at defeating majoritarian movements in the state and federal legislatures intended to redress the imbalance between civil society and the state. For Fiss, as for the rest of the scholars loosely comprising what I have called the new synthesis, this view taken by two generations of progressive historians is defective. But at the end of the day Fiss' replacement is no more satisfactory. To say that the justices neutrally pursued a long-standing conception of liberty—whether one allied to social contractarianism as Fiss maintains, or to natural rights ideology as other writers have believed—is no advance unless it is accompanied by a more complete analysis of how that conception of liberty so skewed the judicial vision that the disparity between public and private power was seen counterfactually.

This is the difficulty with Fiss' antistructuralist form of intellectual history. "The social contract tradition," or for that matter "the natural rights tradition" sat in no seats and decided no cases. Socially-situated human beings are the agents in any such narrative, and it is precisely the forces that "operated in the background and at a deeper level" in structuring their thought that the historian must call upon. A review essay is the place for suggestions rather than conclusions; let me offer two, very briefly outlining their possible role in the further development of the new synthesis.

A. *The Stop in the Mind—Looking Backward*

In our legal culture, judges tend—barring such calculated Presidential indiscretions as a recent Supreme Court nomination—to be people of relatively advanced age, bearing social judgments formed and solidified through extensive experience with the established legal institutions. One of the most common and comprehensible structural limitations on judicial thought is a tendency to reason about the social present—with which judges are often not very familiar—on the basis of the social past as glimpsed during the decades of their active social involvement. This means not only that judges reason from their own personal experiences (explaining why former railroad lawyer Pierce Butler rarely saw rate-making cases in the same way that Louis Brandeis did), but also that in times of rapid social change the larger social vision of the judges can become disconcertingly obsolete, rooted in a vividly-remembered but now quite irrelevant collective past.

Perhaps no American generation before our own—which in common with the rest of humanity is undergoing the most profound cultural transformation since the invention of writing—so thoroughly experienced this effect as the generation educated before the Civil War and sitting on the bench at the turn of the century. The greatest of American autobiographies, *The Education of Henry Adams*, has this cognitive and intellectual deracination as its primary subject.[27] Perhaps none of the judges who decided *In re Debs*[28] had held John Quincy Adams' hand; but they knew the world the ex-President represented, where Quincy had not yet been vanquished by State Street, and the chasm between Virginia and Massachusetts had not yet opened wide enough to bury 660,000 people.

In my opinion the most important feature of the thought of Supreme Court justices in the era Fiss describes is the almost unbroken record of failure in imagining and expressing the degree of postwar social change. This failure of imagination, this stop in the judicial mind, is not adequately described, can perhaps not even be fully recognized, through the elucidation of doctrinal positions. One can flatter any doctrinal proposition, as a

27. **Henry Adams, The Education of Henry Adams: An Autobiography** (1918).

28. In re Debs, 158 U.S. 564 (1895).

judge once said, by giving it a logical form. The stop in the mind is more visible, operating as it does in the background and at a deeper level, when one considers the literary aspects of judicial speech—the explanatory paradigms, the images, the metaphors, which reveal more clearly than chains of reasoning the inner processes of a judge's mind.

Read at this level, the new synthesis will find in the *United States Reports* a record of imaginative obsolescence much more socially significant, if less profoundly expressed, than the inner torment of Henry Adams. Let us consider, from this perspective, *Debs*. Fiss is exceedingly sympathetic to the Court's treatment of the *Debs* injunction, at first glance astonishingly so. Debs' American Railway Union had, against the wishes of Debs and the rest of the leadership, chosen to back the workers of the Pullman Palace Car Company by refusing to cooperate in the movement of trains made up to include Pullman cars. The United States Government responded to the secondary strike by making a Special United States Attorney out of the lawyer for one of the largest American railroads, whom it then backed in seeking an injunction to decapitate the strike by prohibiting the union's leaders, or anyone in sympathy with their goals, from "persuading," in any context, anyone else to support the strike. The injunction was then enforced not only through the arrest and imprisonment of Debs and others for continuing to speak, but also through the mobilization of the United States military—over the objection of the Governor of the State of Illinois, the locus of disturbance—for the forcible resumption of normal railroad operations.

For Fiss, who devotes a chapter to approving of (but not, he says, apologizing for) this result, the Court acted to preserve public order in the face of civil war. He finds Debs' language inflammatory (Debs did indeed say that the use of the military to support employers would result in civil war), though his chronology is scrupulous, and demonstrates the truth that—with one inconsiderable exception at Blue Island junction on July 1, 1894—all the violence that occurred in the ARU's confrontation with the railroads and the Government followed the injunction rather than preceding it.[29]

But my concern is not with the doctrine, or the result, but with what the literature of the Court reveals about the background processes of judicial rumination. The ARU's secondary strike against the railroads using the Chicago hub made real for the first time the social consequences of unregulated clashes between overwhelmingly powerful private economic power and the workers' collective option to withhold their labor at the expense of their wages. One might expect, in this connection, that the Supreme Court would say that "[c]onstitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of the life of the people vary with each succeeding generation." It did,[30] in order to explain that the government's power to enjoin obstructions of highways as nuisances was not limited to waterways but extended also to land highways, despite the paucity of alternatives to Marshall-era admiralty situations as precedents for enjoining such obstructions. That was it. The Debs rebellion was, for all relevant purposes, a ditch that someone had impermissibly dug across a highway, or an illegal dam thrown across navigable water. For description of the central problem of industrial society, the Court could summon at the pivot of its discussion only the assistance of pre-industrial metaphors:

> The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried by railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control.

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29. Here as elsewhere, Fiss is unduly dismissive, in my opinion, of Arnold Paul, whose discussion of the Debs crisis in his classic **Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895** (1960) puts the Court's own actions in a quite fairly-described context.

30. 158 U.S. at 591.

No doubt the Court's failure to imagine alternative metaphors to describe the nature of the dispute was no more profound than that of the other sectors of American government, almost equally impoverished in their cognitive machinery for grasping the new social realities. It never occurred to Richard Olney, I am sure, to deputize a lawyer as Special United States Attorney for the purpose of enjoining George Pullman from cutting wages and raising rents in his company town as a method for relieving the obstruction in railroad traffic. Some tree had fallen across a highway somewhere, and it was easier to cast Debs as a malicious woodsman than Pullman. What doctrine might result from alternative conceptualization is a counterfactual exercise for the law school classroom. The task of the intellectual historian is limited to pointing out that the metaphors judges are socialized to use significantly determine the range of available doctrinal outcomes.

Debs is but an example of an example, for it was not only in the explanatory metaphors employed to visualize the new reality of labor relations that the character of literary imagination affected the development of public law doctrine. At a deeper level there lay the problem of the metaphors used to depict the change in the American economy as a whole. The construction of a national railroad network in the two decades following the end of the Civil War qualitatively altered economic institutions and behavior patterns throughout the United States.[31] As the cities of the East Coast were joined together in a network connecting them to the interior through common lines, the central organizing principle of American commerce since the mid-eighteenth century—competition among the riverine cities of the Atlantic and Gulf littorals—was replaced by another, non-localist dynamic, whose implications were grasped by the new titans of national industrial and financial life, including Andrew Carnegie, John D. Rockefeller, and J.P. Morgan. Yet to the Supreme Court, and the courts in general, the railroad remained a "highway," and the vast multi-jurisdictional corporate enterprises that it spawned or enabled remained "persons," whose status under the Fourteenth Amendment was worked out under the cases

31. *See generally* **John A. Garraty, The New Commonwealth, 1877-1890**, at 86-89 (1968).

following *Santa Clara County v. Southern Pacific Railroad Co.*[32] at the start of Fiss' period. That neither these "roads" nor these "persons" could be treated effectively within the terms established by the metaphor required long and bitter experience, gained in the cases about which Fiss writes.[33]

The cases of the Fuller Court are among the most important sources from which to assess the effect of preindustrial metaphors on social policy in the new industrial state. A full intellectual history of antitrust, for example, awaits the abandonment of the econojargon of recent years in preference for a study of the metaphors elucidating "commerce" in the judicial mind. The mental image of commerce as a physical flow of tangible goods affected more than the decision in *E.C. Knight*[34] that the acquisition of more than 90% of the capacity to manufacture refined sugar lay outside the range of private decisions regulable through the Commerce Clause. It also conditioned a much more realistic judge's later inability to conceive of a commerce in entertainment, which in doctrinal expression precluded the application of the antitrust statutes to the professional baseball business—a subject of passing recent interest.[35]

The goal of linking legal doctrine to political theory is a sound one, and such a task requires not only erudition in the political theory literature, but also precisely the powers of close doctrinal analysis that Fiss so superlatively brings to the reading of the Fuller Court's opinions. But those opinions are more complex symbols than either the doctrinalist or the high political theorist can fully embrace within their two domains. If "culture" is, as one rather schematic social scientist defines it, "the symbolic

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32. 118 U.S. 394 (1886).

33. Fiss' account would profit in particular from consideration of Morton Horwitz' contention that the entity theory of the corporation was developed in cases following *Santa Clara County*, and that the doctrinal environment was still flexible in the early period of the Fuller Court. *See* **M. Horwitz**, *supra* note 17, at 69-92. The Fuller Court's approach to corporate theory is not directly considered in Fiss' text; the metaphor of corporate personality under the Fourteenth Amendment is mentioned in a single footnote. P. 135 n.84.

34. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

35. Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof. Baseball Clubs, 259 U.S. 200, 209 (1922) (Holmes, J.).

aspect of social life,"[36] then the intellectual history of the law is also a field for the doing of cultural history. The cultural history of judicial rhetoric will contribute much to the new new synthesis, the need for which Fiss so profoundly, if ambivalently, demonstrates.

B. *National Power and the Civil War*

I promised two suggestions in the structuralist intellectual history of the Fuller Court. The second must be treated even more briefly than the first, for it touches upon the subject of the single most important unwritten book in the history of American law. As Fiss quite rightly points out, the ditch across the highway is only one of two images that haunted the Court in *Debs*; the other was an image invoked by the words "civil war." For us, those images are remote and intangible, unless we are moved to substitute television pictures from Bosnia or Rwanda. But every one of the justices who decided *Debs*—and indeed one or more sitting justices down to the year of Franklin Roosevelt's election as President—had a personal recollection of the meaning of civil war in the American landscape, or on the surface of his own body.[37]

Attitudes toward the power of majorities in legislatures, and in particular toward increases in the power of the vastly-expanded national government, would no doubt be affected by living through a cataclysmic military confrontation that divided one's "nation," waged with such innovative ferocity that it recalibrated humanity's scale of the possible in the industrial destruction of human life. We need, as we need no other work, our first comprehensive study of the Civil War in American legal history. It is, of course, no criticism of Professor Fiss that he has not written it. Yet the Civil War is almost absent from his

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36. **Donald Black, The Behavior of Law** 61 (1976).

37. Fiss finds "rather bizarre" Justice Holmes' annual celebration of his wounding at Ball's Bluff and Antietam. (P. 374 n.78.) Perhaps it was, but I do not think one can satisfactorily discuss the attitudes Holmes took toward many issues in American public life until one has looked at the forces operating in the background and more deeply as they are revealed in this symbolic behavior. Dismissal is a failure of the historian's imagination resulting from a stop in the contemporary mind.

narrative, as it was not from the lives of the people about whom he writes. One might almost suppose from the text before us that the Civil War was the exclusive responsibility of Professor Fairman. I have never read a work about the post-bellum legal history of the United States that mentioned the writing of Ambrose Bierce; not even, to the best of my recollection, the much less revealing Stephen Crane. The new new synthesis, I think, will ultimately include consideration of the cultural influence of the civil war on the judicial forms of social thought, an influence that lasted, one way or another, until the Saturday morning in January 1932 when Oliver Wendell Holmes, Jr., mentioned to his brethren that he wouldn't be in on Monday.

C. *Holmes and Natural Rights*

That brings us back to the testator himself. This is the first volume in the *Homes Devise History* in which Holmes himself appears, and I believe it is fair to say that he gets rather unsympathetic treatment. Two aspects of Fiss' approach to Holmes, however, are important to the larger issues posed by his version of the new synthesis.

Identification with the justices is a primary imaginative mechanism for Fiss' form of intellectual history, and it is plain that he does not identify with Holmes. In general he follows the approach of analyzing Holmes as a "spectator,"[38] emphasizing what Morton Horwitz calls Holmes' "detached Olympian skepticism."[39] Holmes, for Fiss, "was a fatalist and believed in the inevitable," (p. 143), "a view … uniquely unappealing as a personal or professional ethic … that mocked the pursuit of any ideal." (P. 184.) This "Yankee from Olympus" view of Holmes is not entirely unwarranted, but it has always seemed to me that it takes a part—the dismissive and patrician quality of Holmes' rhetoric—for the whole. In the context of Fiss' larger interpretation of the Fuller Court, which stoutly denies any

38. The most frequently cited scholarship interpreting Holmes' thought in this book is Yosal Rogat, *The Judge as Spectator*, 31 U. Chi. L. Rev. 213 (1964). Some interesting scholarship about Holmes, including two major biographies, has appeared since then.

39. **Horwitz**, *supra* note 17, at 127.

pervading flavor of unreality in the other justices' opinions or extramural descriptions of the social scene, an exclusive focus on Holmes' detachment is downright perverse. Perhaps Holmes' determinism, his "belief in the inevitable" was as deep as Fiss maintains, though I think his belief in the contingency of the world far more important than Fiss ever lets on.[40] Certainly he believed that law develops in the context of social forces larger than those expressed in judicial opinions. He began his study of the early common law with this idea in 1881,[41] and it was expressed in his opinions on the great legal conflicts of his long day, throughout the first third of the twentieth century. But a recognition of the profound forces shaping the rapidly-changing American society was precisely what his brethren mostly lacked, while an ironic doubt of the ability of judges to control the course of change is only "uniquely unappealing as a personal or professional ethic" to a certain kind of person and professional.

Nor did Holmes believe, to quote a particularly foolish statement of Max Lerner's which Fiss seems implicitly to adopt, in "leaving the legislature alone … from a deeper philosophy of leaving the cosmos alone."[42] As Fiss points out, Holmes was more than willing to interfere in the legislature's right, for

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40. Consider, for example, this:

> Chauncey Wright, a nearly forgotten philosopher of real merit, taught me when young that I must not say *necessary* about the universe, that we don't know whether anything is necessary or not. I believe that we can *bet* on the behavior of the universe in its contact with us. So I describe myself as a *bet*-abilitarian.

Letter to Frederick Pollock, August 30, 1929, in 2 **Holmes-Pollock Letters, the Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932**, at 252 (M. De W. Howe, ed. 1941). For other similar examples, see **Philip P. Wiener, Evolution and the Founders of Pragmatism** 276 n.6 (1949 repr. ed. 1972).

41. **O.W. Holmes, The Common Law** (1881).

42. **Max Lerner, The Mind and Faith of Justice Holmes** xxxv (1943). This comment of Lerner's was unearthed by Alexander Bickel, who said it was "acutely observed," thus giving it what seems a termless lease on life. *See* **Alexander Bickel, The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work** 221 (1957) (itself a product of Bickel's research for his assigned volume of the *Holmes Devise*). I have seen this comment repeated many times; usually the quotation descends from Bickel. Never has anyone undertaken to explain, so far as I recall, the alternative to leaving the cosmos alone which Holmes is supposed to have rejected.

example, to embody certain social approaches in an antitrust statute:

> I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried.[43]

May we, in passing, observe the relation between those annual celebrations of the bullets at Ball's Bluff and the *bellum omnium contra omnes*? As I have said elsewhere, I agree with Horwitz and other scholars in believing that the pole star of Holmes' thought, throughout his life, was hostility to theories of natural rights.[44] For him, as for many others of his generation, the all-or-nothing character of arguments over natural rights bore much of the responsibility for the catastrophe of the war. For Fiss, who replaces the seeming connection between the Fourteenth Amendment and the prewar ideology of natural rights with "the social contract tradition," it is perhaps more difficult to see what Holmes is bothered about, whether in *Lochner* or in *Northern Securities*. Thus the most energetic and creative intelligence in the history of American law makes his initial appearance—in the history his fortune bought—in the guise of a sour tautologist, believing in the inevitable, grousing from the sidelines at the passing show. Perhaps this interpretation is destined to be accepted in the end, and if so the very best thing to do is to let it have its way, but finding it presented as an integral part of the intellectual rediscovery of the Fuller Court, stamped with the imprimatur of Holmes' own profile in gold leaf on the cover, is an irony that I think would have appealed more to Holmes than it does to me.

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43. *Northern Securities*, 193 U.S. at 411.

44. *See* Moglen, *Tranformation of Horwitz*, *supra* note 21, at 1052.

So we end where we began, with the symbolic meaning of a book jacket. Professor Fiss has written a fascinating and stimulating book, masterfully contributing to an emerging scholarly movement that promises one of the most satisfying effects that scholarship can have—to recover for us the immediacy and importance of ideas long ignored or misinterpreted. But it is a contribution to the early stages of that discussion and not, as the dead hand of the Devise inevitably suggests, the capstone on the arch. We owe Professor Fiss—along with the other Devise scholars of his generation—a profound debt insomuch as they forbore rolling yet another weighty stone onto the chest of alternative interpretation. The baneful influence of Felix Culpa—with his twin impulses toward monumentalism and personal patronage—is almost vanquished. But it is hard to escape those covers, with their gilding and their long contentious history, long enough to admit that the story they contain is merely one among many, or that the past is still being born. As in so many other ways, the legacy of Justice Holmes is with us yet, both blessing and curse, and will be for many days to come.